



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 14, 1997

Mr. S. Cass Weiland
Capshaw, Weiland, Goss & Bowers
901 Main Street, Suite 2600
Dallas, Texas 75202

OR97-2496

Dear Mr. Weiland:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 110421.

The Kaufman County Sheriff's Department (the "department"), which you represent, received a request for information relating to a narcotics raid in Kaufman County. You state that some of the requested information has been released. You claim, however, that the remaining information is excepted from disclosure under sections 552.102 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of documents.¹

Section 552.301 of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth calendar day after the date of receiving the written request. The department received the written request for information on August 22, 1997. You did not request a decision from this office until September 3, 1997, more than ten days after the requestor's written request. Therefore, we conclude that the department failed to meet its ten-day deadline for requesting an opinion from this office.

When a governmental body fails to request a decision within ten days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston*

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Chronicle Publ'g Co., 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 (1977) at 2.² Therefore, we will examine whether the documents are confidential and must be withheld from public disclosure.

You claim that certain portions of the officers' personnel files are excepted under section 552.102. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public under section 552.102 when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. After reviewing the documents at issue, we do not believe that they may be withheld based on a right of privacy. See Open Records Decision No. 470 (1987) at 4 (public employee's job performance does not generally constitute his private affairs). Therefore, the department must release these documents to the requestor, with the following exceptions.

Some of the information at issue is confidential by law. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section also encompasses information protected by other statutes. The Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes, protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). The medical records submitted to this office for review may only be released as provided by the MPA. Texas law also prohibits the public disclosure of psychological records. Communications between a patient and a professional and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional are confidential. Health & Safety Code § 611.002(a). We have marked the records that you must withhold under the MPA and section 611.002 of the Health and Safety Code.

²In this instance, you have not presented this office with a compelling demonstration as to why the requested information should be withheld pursuant to section 552.108. Therefore, we deem that you have waived your section 552.108 exception.

The Seventy-fifth Legislature added section 552.130 to the Open Records Act which governs the release and use of information obtained from motor vehicle records. Section 552.130 provides in relevant part as follows:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]

See Act of May 29, 1997, S.B. 1069, § 4, 75th Leg., R.S. (to be codified at Gov't Code § 552.130). The documents at issue contain Texas drivers' license information which you must withhold pursuant to section 552.130.

Finally, we note that some of the information in the officer's personnel file is confidential under section 552.117. Section 552.117 of the Government Code provides that information is excepted from disclosure if it relates to a peace officer's home address, home telephone number, social security number, or reveals whether the peace officer has family members. Cf. Open Records Decision Nos. 622 (1994) (section 552.117 excepts from disclosure former home addresses and former home telephone numbers), 455 (1987). Thus, you must withhold this information as contained within the submitted documents.

In the absence of a demonstration that the remaining information is confidential by law or that other compelling reasons exist as to why the remaining information should not be made public, you must release the information. Open Records Decision No. 195 (1978). See also Gov't Code § 552.352 (distribution of confidential information is criminal offense); Gov't Code § 552.023(a) (person has right of access to information that relates to that person and is protected from disclosure by laws intended to protect that person's privacy interests).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script, appearing to read "June B. Harden".

June B. Harden
Assistant Attorney General
Open Records Division

JBH/ glg

Ref.: ID# 110421

Enclosures: Submitted/ marked documents

cc: Mr. L.E. Jack Driscoll, Investigator
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(w/o enclosures)